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'LAWFARE', INSTRUMENTS OF GOVERNMENTALITY AND ACCOUNTABILITY, OR BOTH? AN OVERVIEW OF NATIONAL COMMISSIONS OF INQUIRY IN AFRICA

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National commissions of inquiry are an important feature of the modern global landscape of justice mechanisms. They are not a recent innovation, having enjoyed a long history that pre-dates colonialism. To understand how they can more effectively contribute to accountability processes in Africa, it is first critical to situate them in their historical and colonial context: considering the competing political and social interests at stake. History reveals that commissions of inquiry have a 'repetitive and cyclical nature', often established by governments or empires during specific kinds of crises with a crescendo building up to processes that are intensive both in terms of human and other resources, only suddenly to disappear from national consciousness and potentially to be re-invoked at a later point in time.¹

The colonial legacy of national commissions is one in which commissions are looked upon with suspicion because of the instrumental function they often played for colonial states. However, there are several examples of commissions that defied popular perception and were able to critique colonial rule and sometimes to catalyse policy reform. The heightened roles these commissions were able to play in broader processes of accountability were facilitated by certain features integral to the particular commission (such as its independence and impartiality, its investigatory powers, or its ability to publish its report) but also by circumstance or chance (such as occurring at what turns out to have been the right political moment, an active social movement on the ground, or even the choice of a particular commissioner). This chapter embarks upon a historical survey of national commissions of inquiry in Africa to draw

1 A. Kok & E. van der Spuy 'South African Inquiries into Policing, 1910-2015' *South African Crime Quarterly* 53 (2015) p.1-24.

lessons from past experience that might guide the manner in which future national commissions are constituted in African societies.

1 History of national commissions of inquiry

National commissions of inquiry in the English-speaking world have a lineage dating back as far as the eleventh century in the British common law system. The creation of the Domesday Book of Land Ownership in England, an information-gathering exercise conducted from 1080 to 1086 at the behest of William I ('the Conqueror') was the first time the Crown had examined its own workings and modified its powers as a result of research and recommendations by its own agents.² English commissions, also known as royal commissions, became an established feature of English administration long before the establishment of Parliament or modern legislative procedure. They derived their authority by virtue of the royal prerogative, or later by parliamentary authority.³

Royal commissions have been a mainstay of Commonwealth countries since the nineteenth century. In the United Kingdom public inquiries, most notably in the form of royal commissions, have been used extensively, initially as a means by which the Crown could obtain advice or inquire into specific issues or wrongdoings outside of institutions such as Parliament. In Canada, public inquiries, again mainly in the form of royal commissions, have been used in considerable numbers since confederation in 1867. Similarly, public inquiries have been relied upon in Australia since it was a penal colony in 1819 and in New Zealand since 1855.⁴

2 R. Fitzgerald Setting Up and Running Commissions of Inquiry: Guidelines for Officials, Commissioners and Commission Staff (Wellington, New Zealand: Department of Internal Affairs, 2001).

3 T. Lockwood 'A History of Royal Commissions' *Osgoode Hall Law Journal* 5 (1967) pp.172, 179, 180.

4 *Ibid.* See generally pp.179–199. At the Commonwealth level the first public inquiry following Australia's federation was a royal commission established in 1902 concerning the transportation of troops from South Africa. See S. Sidney *The Three Colonies of Australia: New South Wales, Victoria, South Australia* (London: Ingram, Cooke & Co., 1852) p.81; Scott Prasser 'Australian Royal Commissions and Public Inquiries: Their Use and Abuse and Proposals for Reform' Paper presented at 'The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives' (University of Windsor, Canada, May 2011) available at: http://www.acu.edu.au/_data/assets/pdf_file/0019/350911/Prasser_Windsor_Conf_Final_190511.pdf; A. Simpson 'Commissions of Inquiry – Functions, Power and Legal Status' *Te Ara – The Encyclopaedia of New Zealand*, available at: <http://www.TeAra.govt.nz/en/interactive/33416/commissions-of-inquiry-1909-2011>.

Commissions were also used in non-Commonwealth countries, for example to expose governmental corruption in France during the 'Panama Scandal' of the early 1890s, although their history is less well documented.⁵ Meanwhile, in the United States the predominant form of public inquiry at the national level has been through the extensive congressional committee system and presidential commission or task force.⁶

Today, national commissions of inquiry are ubiquitous, and serve as an option for governments around the world to launch various forms of *ad hoc* inquiries into pressing issues of the day. In recent years, some of the more high-profile inquiries have included the Leveson Inquiry, a British judicial inquiry in 2011 investigating the culture, ethics and practices of the British press following the News International phone hacking scandal; a French parliamentary commission investigating the 2015 terrorist attacks in Paris; a Canadian inquiry in 2016 to investigate the epidemic of missing and murdered indigenous women over a 35-year period; a Royal Commission of Inquiry in 2017 to investigate the foreign currency transaction losses suffered by Bank Negara Malaysia during the 1990s; and a presidential commission in 2018 focused on state capture in South Africa.⁷

The reliance of modern African states on their power to constitute commissions of inquiry as part of their accountability apparatus stems in no small measure from a colonial legacy. While European and other colonial governments were experimenting with commissions of inquiry in the metropolises as a mechanism by which to govern European peoples, they were also utilising them in the colonies as an instrument to 'impose

5 Jeremy D. Popkin *A History of Modern France* 4th ed. (Routledge, 2013) p.166.

6 G.B. Galloway 'Presidential Commissions' [Editorial Research Reports 1931 (Vol. I)] (Washington, DC: CQ Press, 1931), available at: <http://library.cqpress.com/cqresearcher/cqresrre1931052800>.

7 Jesselyn Cook 'Canada is Finally Launching an Inquiry into its Missing and Murdered Indigenous Women Crisis' *Huffington Post* (1 September 2016) available at: http://www.huffingtonpost.com/entry/canada-mm-w-inquiry_us_57c834a3e4b0e60d31dd5f53; Angelique Chrisafis 'Paris Attacks Inquiry Finds Multiple Failings by French Intelligence Agencies' *Guardian* (5 July 2016) available at: <https://www.theguardian.com/world/2016/jul/05/paris-attacks-inquiry-multiple-failings-french-intelligence-agencies>; 'Royal Commission of Inquiry to Probe 1990s Forex Losses' *The Star Online* (19 July 2017) available at: <https://www.thestar.com.my/news/nation/2017/07/19/rci-gets-kings-approval-royal-commission-of-inquiry-to-probe-1990s-forex-losses/>; J Gerber 'Zuma Appoints State Capture Commission, to be Headed by Deputy Chief Justice' *News 24* (9 January 2018) available at: <https://www.news24.com/SouthAfrica/News/breaking-zuma-appoints-state-capture-commission-to-be-headed-by-deputy-chief-justice-20180109>. Also see archived version of the website of the (UK) Leveson Inquiry, available at: http://webarchive.nationalarchives.gov.uk/20140122144906f_/http://www.levesoninquiry.org.uk/.

throughout colonial empires. Commissions were routinely instituted to investigate, document and legislate forms of traditional authority, land-holding patterns, property relations, marriage practices, rituals and beliefs.¹¹ The commissions had an ethnological dimension to them and were used to lay the groundwork for native administration and to explore the terms on which state power could be consolidated and reproduced.¹² Every British official was, by assignment, 'a source of reports' for colonial administration, and therefore took an interest in the history and anthropology of the communities in which they worked to enable more effective policies of control.¹³ This was particularly true for British India, where commissions enjoyed a prestige that made them a popular form of public inquiry, as well as in the British West Indies.¹⁴

Some commentators have remarked that the commission of inquiry as a 'feature of colonialism' has 'scarcely' been dealt with by historians.¹⁵ What is certain, however, is that colonial states tended to rely heavily on legal instruments, including commissions of inquiry, resulting in a post-colonial legacy in which governance in former colonies came to be heavily dependent upon the language of law.¹⁶ Sociologists John and Jean Comaroff have characterised it as 'lawfare' – a coercive legal tactic used to dominate a colonised people.¹⁷ In closely reviewing the texts of several commissions of inquiry in colonial South Africa, for example, Adam Ashforth concluded that commissions were constituted to create 'schemes

- 11 R. Shamir & D. Hacker 'Colonialism's Civilizing Mission: The Case of the Indian Drug Hemp Commission' *Law and Social Inquiry* 26(2) (2001) pp.435–61.
- 12 Adam Ashforth *The Politics of Official Discourse in Twentieth-Century South Africa* (Oxford: Clarendon, 1990).
- 13 J Magode Ikuya 'What Purpose Do Commissions of Inquiry Serve?' *Observer [Uganda]* (14 October 2009) available at: <http://www.observer.ug/component/content/article?id=5540:what-purpose-do-commissions-of-inquiry-serve>.
- 14 Harold F. Gosnell 'British Royal Commissions of Inquiry' *Political Science Quarterly* 49 (1934) pp.84–91.
- 15 Paul Swanepoel 'Colonial Judges, Administrative Officers and the Bushe Commission in Interwar Kenya and Tanganyika' *Fundamina* 23(1) (2017) pp.89, 90–92.
- 16 Comaroff & Comaroff, 'Policing Culture, Cultural Policing' pp.539–40.
- 17 John Comaroff 'Colonialism, Culture, and the Law: A Foreword' *Law & Social Inquiry* 26(2) (2001) pp.305–314 ('That mode of warfare – or rather lawfare, the effort to conquer and control indigenous people by the coercive use of legal means – had many theaters, many dramatic personae, many scripts'). This meaning, and the one intended in this chapter, is distinct from another meaning of 'lawfare' that has emerged particularly in American national security commentary, after Major General Charles Dunlap used the term 'lawfare' (also in 2001); see Charles J. Dunlap 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001) available at: [http://www.ksg.harvard.edu/cchrp/Web %20 Working%20Papers/Use%20of%20Force/Dunlap2001.pdf](http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf).

of legitimisation' for the colonial state, or 'concrete plans of action designed to achieve the 'proper' ... means and objectives of power'.¹⁸ Exploitative and repressive state practices *vis-à-vis* the reliance on black South African labour were presented by colonial powers as rational and scientific, just and necessary for the development of the colonial state and economy.¹⁹ In this manner, Sitze argues, commissions of inquiry represented the evolving 'governmentalisation of the state', whereby the strength and stability of a given political order no longer was primarily measured by the territory it defended, but rather 'by the felicity of its management of the natural and social life entrusted to its care'.²⁰

An examination of the mechanics of these commissions reveals that although London, in the case of the British Empire, largely controlled their establishment and staffing, once they were constituted they operated with a fair amount of autonomy. The appointment of a commission was an attempt to resolve a legal conflict in a colonial territory from 'outside'. In the British Empire, demands from the colonised peoples – either directly to the department involved or to the media – and members of parliament often resulted in the constitution of any one of seven categories of commission: public administration; social services; the regulation of public morals; changes in private law; colonial administration; economic questions; and political questions.²¹ Sometimes governors of particular colonies requested that the colonial office appoint a commission.²² These were often staffed by colonial office officials who were usually stationed in London and who had little experience of the colonies, further contributing to the external control of commissions.²³ Although they derived their authority from the Crown and were appointed by ministers, they were charged with a narrow remit and able to function apart from formal political structures.²⁴ Commissions had near unfettered discretion to regulate their own proceedings, enjoying a great deal of autonomy from various British departments.²⁵ Their findings exposed divisions both within the colonial office and the colonial state.²⁶

18 Ashforth, *Politics of Official Discourse*, p.8.

19 *Ibid.*

20 Adam Sitze *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: Michigan University Press, 2013) p.12.

21 Swanepoel, 'The Bushe Commission,' pp. 90–92.

22 *Ibid.*

23 *Ibid.*

24 Bonham Richardson, 'Depression Riots and the Calling of the 1897 West India Royal Commission' *New West Indian Guide/Nieuwe West-Indische Gids* 66 (1992) pp.169–91.

25 Swanepoel, 'The Bushe Commission,' pp. 90–92.

26 *Ibid.*, pp.108–09. The author investigates the Bushe Commission in East Africa,

The success of these royal commissions relied upon various factors: able public administrators; careful written statements as the basis for testimony; the willingness of individuals to serve as commissioners or witnesses; the use of experts; and an impartial view of the facts.²⁷ Commissioners, who were normally unsalaried but given a small stipend, rarely had experience in interviewing witnesses, and often lacked the formality of judges presiding over commission proceedings today.²⁸ British commissions of inquiry also presented metropolitan and, in some ways, cross-cultural perspectives on colonial issues.²⁹ The colonial commissions coincided with what has been called 'The Great Era' of the royal commissions in the British Isles, addressing nineteenth-century social and industrial problems.³⁰ Despite lacking binding authority, commission recommendations carried 'extraordinary' weight and influenced the course of colonial rule throughout the empire.³¹ Commissioners inevitably compared social and economic issues across regions, with testimony often comparing events in the West Indies to those in South Africa or Sri Lanka.³²

As the following parts make clear, although royal commissions often served as repressive instruments of external control by the British Empire, the considerable autonomy afforded their operations in the colonies created spaces that resulted in unanticipated consequences including, arguably, contributions to the end of colonialism itself.

1.2 Commissions in the West Indies

The experience of royal commissions varied over time and geographically, but it remains uncontested amongst commentators that one use of these commissions was to legitimate the repression of civil unrest in the colonies.

From the perspective of the British Empire, the 'crowning achievement' of the British Caribbean's nineteenth-century era of royal commissions – and a model upon which several twentieth century British commissions were based – was the West India Royal Commission of

revealing the conflict in administration of justice from the perspective of the Colonial Office as opposed to the colonial state.

27 *Ibid.*, pp.90–92.

28 *Ibid.*

29 Richardson, 'Depression Riots,' p.170.

30 H. Clokie & J. Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford University Press, 1937).

31 Richardson, 'Depression Riots,' p.170.

32 *Ibid.*

1897, one of the first comprehensive, region-wide commissions.³³ It offers a lens through which to view how the deployment of 'lawfare' ultimately served the colonial state's political ends throughout the colonies. The proffered mandate of the commission was to investigate the local causes of the severe economic depression in the late nineteenth century British Caribbean, where an island labour system geared to high volume export led to low wages, insecurity of job tenure and dependence on day labour, and created 'distress among the labouring populations'.³⁴ As with many royal commissions, however, the true catalyst for action rested in the growing number of riots and protests among workers in the colonies – including major ones in St Kitts and British Guiana – which, as Bonham Richardson observed, had 'caught London's attention much more readily than did malnutrition data'.³⁵ And yet, the eventual commission recommendations were silent on issues of political change.³⁶

As civil disturbances continued to increase in the West Indies, subsequent commissions shifted their emphasis away from criminal investigation of individual strikers or rioters, and towards a broader focus on underlying factors such as rural levels of poverty.³⁷ However, while they often identified the underlying economic causes of civil disturbances, commissions actually facilitated a response by the colonial government to the civil disturbances of 'coercion and concession'.³⁸ During the 1930s commissions became an instrument *ex post facto* to justify coercive techniques of colonial policing and maintain white racial and economic dominance through violence. This correlation was at the root of popular unrest, but the colonial state's refusal to redress this socio-economic imbalance led to further repressive policing, including mass arrests and the use of lethal force. By the end of World War II, Jamaica 'was a colony in revolt against state violence; a violence born of its political economy', and commissions merely served as an instrument to facilitate a repressive colonial state.³⁹

While Kenyatta's fable represents a telling perception of how royal commissions were deployed as lawfare in many cases, we next turn to a

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*, p.171.

36 *Ibid.*, p.177.

37 M. Thomas, 'The Political Economy of Colonial Violence in Interwar Jamaica' (Stanford University, April 2008) available at: <https://web.stanford.edu/dept/france-stanford/Conferences/Terror/Thomas.pdf>.

38 Swanepoel, 'The Bushe Commission' p.92.

39 Thomas, 'Political Economy of Colonial Violence' p.12.

review of some colonial African commissions that paint a more complex picture of the legacy they leave for modern-day African governments.

2 Commissions of inquiry in colonial Africa

Given their heritage in the political apparatus of former colonial powers, commissions of inquiry have proved to be a relatively frequent feature of the African legal landscape. All the features and political dynamics of colonial commissions elsewhere were equally present in pre-independence Africa. This part examines a selection of colonial era commissions in French, Belgian and British Africa to set the historical context for the modern commissions we examine in more detail in subsequent chapters. Although the history is less well-documented, France and Belgium had significant experience with constituting commissions of inquiry in a manner similar to the British, but with less centralisation. The experience of these commissions was mixed, with many commissions serving to legitimate the colonial state in the French colonies, but others that actually disrupted the course of colonial rule.⁴⁰

2.1 French Africa

In 1894 France established a Ministry of Colonies which intended for colonial administration to be sufficiently decentralised so as 'not to strangle official initiative in the colonies or to stunt the development of the colonies'.⁴¹ The central administration was divided into regional bureaus, but their responsibilities and powers were unclear and ministers of the colonies often lacked information about the colonies. As a result, it was often the governors-general in the colonies who gave directions about policy to the ministers, with colonial policy being developed, unlike in the British system, on a short-term *ad hoc* basis in Dakar, Brazzaville and Tananarive.⁴² After 1913 the secretariat in the French colonies was merged with the Corps of Colonial Administrators, who were permitted to govern according to their whims and inclinations. According to Corps regulations, an administrator suspected of malfeasance was to be investigated by a commission of inquiry consisting of fellow administrators within the colony. Yet, as a result of the leniency of the commissions of inquiry

40 See, for example, John Daniels 'The Congo Question and the "Belgian Solution"' *North American Review* 188 (December 1908), pp.891–902; Geoffrey Gunn, *Rice Wars in Colonial Vietnam: The Great Famine and the Viet Minh Road to Power* (Lanham, MD: Rowman & Littlefield, 2014), ch.3, pp.93–96.

41 William B. Cohen *Rulers of Empire: The French Colonial Service in Africa* (Stanford: Hoover Institution Press, 1971), ch.4, available at: http://www.webafriqa.net/library/rulers_empire/chap04.html.

42 *Ibid.*

towards charges of maladministration, only five administrators were dismissed between 1887 and 1910.⁴³

The following commissions reflect these metropole-colony tensions inherent in the colonial relationship, and the manner in which these dynamics impacted on the ability of the commissions to have impact. Ultimately, even well-structured and well-operated commissions were overshadowed by the political considerations of the day.

2.1.1 1937: Commission of inquiry in the French overseas territory

The *Front Populaire* was a coalition formed by leftist parties to secure the majority seats in the French legislative elections of May/June 1936, allowing Léon Blum to become the first socialist Prime Minister of France.⁴⁴ Due to its liberal leanings, the *Front Populaire* was considered a new hope for the colonies that sought a less exploitative relationship with the colonisers.⁴⁵ Its members agreed on the need to establish comprehensive colonial policies reflecting the political leanings of the party. To this end, with decrees of February and May 1937, the *Front* established a Commission of Inquiry into the Colonies, tasked with examining ‘the needs and legitimate aspirations of the populations living in the colonies, the countries under French protectorate and those in sub-mandated territories’.⁴⁶

The Commission was composed of 37 men from various fields (university, parliament, administrators, clergy, trade unions and liberal arts) and one woman, a journalist named Andrée Viollis. Due to the size of the territory covered, the Commission was subdivided into three sub-committees, each of which covered specific territories: Morocco and Tunisia; the American colonies, Africa, Madagascar and Reunion; and Indo-China, French India and Oceania colonies.

In the first phase of the Commission’s work, the Commission consulted various institutions to gather relevant data through completion of a questionnaire by French and local officials in the colonies. The focus of this phase was to gather all the ‘information indispensable for

43 *Ibid.*

44 Serge Berstein *La France des Années 30*, 5th ed. (Paris: Armand Colin, 2011) p.103.

45 M Lagana ‘L’échec de la commission d’enquête coloniale du Front populaire’ *Historical Reflections/Réflexions Historiques* 16(1) (1989), p.79.

46 ‘Ministère des Colonies. Commission d’enquête dans les territoires d’outre-mer dite « Commission Guernut » (1918/1939)’ Archival Record of the *Archives nationales d’outre-mer* [FR ANOM 130COL 1 à 107] available at: <http://anom.archivesnationales.culture.gouv.fr/ark:/61561/ya818xsq>.

the elaboration of a new colonial doctrine'.⁴⁷ The Commission gathered an impressive amount of data in the form of reports, statistics, executive summaries from colonies' administrators and the statements of interests expressing the wishes of the colonised populations. Despite this invaluable contribution to the archive, the Commission was not able to complete its mandate as the Commission was refused the accreditation it needed to operate in the colonies. This led to the resignations of all members of the Commission and the dissolution of the Commission.

The Commission's work was condemned from the start due the political climate in France at the time. Indeed, the *Front Populaire* was eager to reform the colonial system to enable the progressive emancipation of the colonies, but the political and economic ambitions of politicians and powerful settlers made this impossible.⁴⁸ Despite the *Front Populaire's* best efforts, the Commission's work had no impact on the colonial policies of France. The data gathered by the Commission was never used by the government. The coalition's draft *Code de l'indigénat* (Natives Act), a piece of legislation intended to improve the lives of the colonised and to include them in the administration of their territories, was emptied of its substance and eventually repealed by Parliament.

2.1.2 1950: Commission of inquiry into the incidents in Côte d'Ivoire

As independence movements started to grow across Africa, France's desire as a colonial power to retain its territories led to brutal repressions throughout its colonies. A commission was established by the French Parliament to investigate the disturbances that occurred in Côte d'Ivoire in 1949 and 1950, specifically the Dimbokro shooting on 30 January 1950. This event, which saw the killing of 14 people and the wounding of another 60 at the hands of colonial forces, was the *denouement* of a saga triggered by Felix Houphouët-Boigny, the head of the African Democratic Rally (RDA) and member of parliament for Côte d'Ivoire publicly declaring his desire to fight against 'colonial oppression' and affirming his solidarity with the Vietminh and the Malagasy people. Following his declaration, the colonial administration, headed by Governor Laurent Péchoux, manufactured dissent within the RDA and used it as a pretext to arrest RDA members. This, in turn, led to protests, strikes, and finally to the colonial administration calling upon the army violent to break up protests. The bloodshed at Dimbokro, alongside other lethal events at Bouaflé and Ségouéla, prompted the establishment of the Commission.⁴⁹

47 Lagana, 'L'échec de la commission d'enquête coloniale,' p.85.

48 *Ibid.*

49 Yves Benot *Massacres coloniaux* (La Découverte, 1994), pp.148–149; Marianne Cornevin

Headed by Leon Gontran Damas, one of the founders of the Négritude movement, the Commission was never able to publish its findings due to disagreements between the commissioners. Nonetheless, some contents of the Commission's findings in the Damas Report were made public, such as its assessment that it was not the RDA that had started the uprising but rather the French government in an effort to destroy the party. Côte d'Ivoire's former governor, Georges Orselli, testified that the Ministry for Overseas Territories had tasked him with destroying the RDA.

The Damas Report is of great importance for historians who view it as a prime reference for colonial repressions in West Africa. In Côte d'Ivoire, in what certainly was an unintended consequence, the report became an important document for the RDA and was a decisive factor in Côte d'Ivoire's accession to independence.⁵⁰

2.2 Belgian Africa

2.2.1 1904: Commission of inquiry into the abuses committed in the Congo

In 1903, with European pressure mounting against King Leopold II and his policy of 'maximum exploitation', British consul Robert Casement published a report dubbed the 'Casement Report' detailing the atrocities committed by agents of Leopold's administration in the Congo. In response, the Belgian Parliament, headed by socialist leader Emile Vandervelde and other detractors of Leopold II's Congolese policy, forced the King to establish an independent commission to investigate the Congo, which he did by royal decree on 23 July 1904.

The Commission was aimed at 'investigating whether, in certain parts of the territory, acts of ill-treatment were committed against the natives, either by private individuals or by agents of the state [and] to report any useful improvements'.⁵¹ Its focus was the so-called 'hands-cutting affair', the systematic mutilations, torture and killings at the directive of Leopold of indigenous populations who sought to evade forced labour or were considered not sufficiently productive.⁵² In 1905 this Commission confirmed that abuses had been committed in a 160-page report attacking

Histoire de l'Afrique Contemporaine (Payot, 1978) pp.188–189.

50 Sandrine Poujols & Benoist Lhoni 'Damas Léon-Gontran: 'Martyr de l'oubli'' *L'Arbre à Palabres* [DUNIA] No.10 (December 2001) available at: http://www.revues-plurielles.org/_uploads/pdf/13_10_12.pdf, p.107.

51 Edmond Janssens, Giacomo Nisco & Edmond de Schumacher, 'Rapport de la Commission d'enquête' *Bulletin Officiel de l'État Indépendant du Congo*, Nos.9 & 10 (1905) p.2.

52 Arthur Conan Doyle *Le Crime du Congo belge* (1909) p.118.

the state of the Congo. The report did not include any direct quotations from Africans, whose testimony remained unread until the 1980s, when it was discovered in an archive in Brussels. Moreover, the report did not affix personal responsibility to individual perpetrators, rather focusing its duty to examine abuses of a general nature which could shed light 'on the conditions of the natives'.⁵³

The Commission was considered international and was composed of three members from the judiciary of various courts. The three commissioners were Edmond Janssens, General Counsel at the Brussels Court of Cassation, Baron Giacomo de Nisco, President of the Boma Court of Appeal and Edmond de Schumacher, a Swiss jurist, deputy secretary and a medical doctor.⁵⁴ King Leopold himself had sent the three foreign judges to the Congo, to stress the Commission's lack of bias, and had gambled that the judges' inability to speak any African languages and their cooperation with the authorities in the Congo would result in a positive report.⁵⁵

Once established, though, the Commission functioned independently from the government. The decree held that the government had no powers over the Commission and as such could not limit the scope of the investigation or the duration of the mandate. The Commission was endowed with unlimited powers to receive any evidence of any kind and to requisition public prosecutorial functions. Hundreds of testimonies were collected from local enslaved populations, missionaries, and administration officials throughout 26 towns and villages along the coast of the Congo river. Accompanied by translators and a local interpreter, the statements were translated before being recorded. All statements were verified and signed at the end of each hearing. Assistants of the Commission were also able to ask questions of the witnesses or to make certain observations about the testimony given.⁵⁶

As an immediate response to the report, Leopold arranged for an organisation called the West African Missionary Association to send a heavily-censored 'summary' of the report to various newspapers.⁵⁷ Despite this attempt at suppression, the report of the Commission established by

53 *The Congo: A Report of the Commission of Enquiry Appointed by the Congo Free State Government*, a translation (1906) pp.14–15.

54 *Ibid.*

55 See Adam Hochschild *King Leopold's Ghost* (Boston: Mariner Books, 1998) ch.16, and generally.

56 *Ibid.*, ch.17.

57 *Ibid.*

Leopold had such a profound impact on European nations that it led to a change of Congo's status. On 15 November 1908 the Parliament of Belgium voted to annex the Congo Free State and took charge of its administration. The Commission report had recommended this transfer of power, as 'inspired' by the Congolese.⁵⁸ The scale of abuses committed was such that a 1919 commission by the Belgian government estimated that the Congo had lost half of its population due to Leopold's policies.⁵⁹

2.3 British Africa

2.3.1 1929: *Aba Commission of Inquiry*

Throughout Africa, the British employed a policy of indirect rule, whereby indigenous chiefs helped to govern Britain's territories.⁶⁰ This policy was elevated to the level of an administrative ideology by Frederick Lugard, the first colonial governor of Nigeria (from 1914 to 1919).⁶¹ However, there were areas in Nigeria that had no chieftaincy traditions, such as the Igbo region of Eastern Nigeria. In those places, the British manufactured a chieftaincy institution by appointing willing participants and giving them 'warrants' to act as local representatives of the British administration among their people.⁶² These 'warrant chiefs' abused these newly-ordained powers and accumulated wealth – behaviour that was alien among the Igbo people, where decisions had traditionally been made by protracted debate and general consensus.⁶³

Increasing resentment among the Igbo people in 1929 led to a women's revolt – *Ogu Umunwaanyi* – in which thousands of peasant women protested against the introduction of taxes, the warrant chief system, and the low prices of agricultural produce emanating from the global depression of the late 1920s.⁶⁴ By December 1929 these women had destroyed or damaged 16 native courts, and official reports estimate that approximately 50 women were killed and 50 injured by the response of colonial troops.⁶⁵ In addition, the houses of warrant chiefs and native

58 *Report of the Commission of Enquiry Appointed by the Congo Free State Government* p.167.

59 Léon Guebels *Relation complète des travaux de la commission permanente pour la protection des indigènes belge 1911-1951* (Élisabethville: CEPESI, 1954) pp.196–197.

60 Adiele E. Afigbo *The Warrant Chiefs: Indirect Rule in South-Eastern Nigeria, 1891–1929* (Oxford: Clarendon, 1972).

61 *Ibid.*

62 Elizabeth Isichei, *A History of the Igbo People* (London: Macmillan, 1976).

63 *Ibid.*

64 *Ibid.*

65 Ekwere O. Akpan & Violetta I. Ekpo *The Women's War of 1929 (Preliminary Study)*:

court personnel were attacked, European factories were looted, and prisons were attacked and prisoners released. The women called for the revocation of the warrant chief system, the removal of warrant chiefs, and their replacement by indigenous clan heads appointed by the people rather than by the British.

Throughout late December 1929 and early January 1930, two commissions of inquiry were set up to investigate the remote and immediate causes of the women's movement.⁶⁶ The second of these commissions, the Aba Commission, had broader terms of reference and was composed of British colonial administrators, African and European barristers, and counsel representing the Crown as commissioners.⁶⁷ These commissions sat in over 30 locations throughout the eastern region to collect evidence and recommend punishment for the actors or their communities. Of the 485 witnesses who appeared before the Commission, only 103 were women.⁶⁸ Overall, the Commission felt that the Igbo were unhappy with the general system of administration being imposed upon them, and that the women were only expressing it more than the men.⁶⁹ The first Commission exonerated the soldiers who fired on the women, focusing on the 'savage passions' of the 'mobs'.⁷⁰

According to commentators, the Commission failed to understand or explore how the women were engaged – if on a larger scale than ever before – in a traditional practice of 'sitting on a man', whereby women would shun men who devalued women or otherwise caused trouble.⁷¹ This practice was accepted in Igbo culture as an expression of women's political and social power, but for its expression in colonial Nigeria, many women lost their lives, without apparent consequence for the officials. Although the second commission departed from the first, clearly stating there had been no justification for opening fire on the women, it nevertheless commended the officials concerned for their handling of the situation, describing the acting officer as 'unlucky' for governing an area in which

A Popular Uprising in South Eastern Nigeria (Calabar: Government Printer, 1988) p.43.

66 Samantha Mallory Kies 'Matriarchy, the Colonial Situation, and the Women's War of 1929 in Southeastern Nigeria' MA thesis, Eastern Michigan University, 2013 p.106; see also Aba Commission of Inquiry *Notes of Evidence Taken by the Commission of Inquiry Appointed to Inquire into the Disturbance in the Calabar and Owerri Provinces, December, 1929* (1930).

67 Marc Matera, Misty Bastian, & Susan Kingsley Kent *The Women's War of 1929: Gender and Violence in Colonial Nigeria* (London: Palgrave MacMillan, 2012).

68 Aba Commission of Inquiry, *Notes of Evidence Taken by the Commission*.

69 Kies, 'Matriarchy, the Colonial Situation and the Women's War' p.111.

70 *Ibid.*, p.112.

71 *Ibid.*

there was 'a conscious feeling of distrust had been instilled in the minds of the people'.⁷²

The 1929 women's revolt brought about fundamental reforms in British colonial administration. The Commission was awestruck at the power of the women to institute this kind of uprising, stating that '[n]o one, listening to the evidence given before us, could have failed to be impressed by the intelligence, the power of exposition, the directness, and the mother-wit, which some of the leaders exhibited in setting forth their grievances'.⁷³ As a result, the colonial administration abolished the warrant chief system and reassessed the nature of colonial rule among the native populations of Nigeria. Several colonial administrators condemned the prevailing administrative system and agreed to the demand for urgent reforms based on the indigenous system. Court tribunals that incorporated the indigenous system of government that had prevailed before colonial rule were introduced to replace the old warrant chief system.⁷⁴

2.3.2 1959: Nyasaland Commission of Inquiry

Dr Hastings Banda, a candidate for the Nyasaland African Congress (NAC) presidency, returned to Nyasaland in 1958 and launched a campaign demanding progress towards majority rule. The British and Nyasaland governments claimed that they had gathered intelligence that the NAC was preparing a campaign of sabotage and murder,⁷⁵ which led to a declaration of a state of emergency in March 1959, with mass arrests and harsh detention of over 3 000 activists and prominent leaders of the NAC.⁷⁶ Within the first month of the state of emergency, 51 people were killed by troops or the police;⁷⁷ over 1 000 people had been detained without trial; and over 2 000 convicted of political offences.⁷⁸ The commotion caused by these arrests and associated violence led to the appointment by the British government of a commission of inquiry under the chairmanship of a British judge, Patrick Devlin.

72 *Ibid.*, pp.112–113.

73 *Ibid.*, p.117.

74 *Ibid.*, pp.116–126.

75 Philip Murphy 'A Police State? The Nyasaland Emergency and Colonial Intelligence' *Journal of Southern African Studies* 36 (2010) p.765.

76 Paul Chuidza Banda & Gift Wasambo Kayira 'The 1959 State of Emergency in Nyasaland: Process and Political Implications' *The Society of Malawi Journal* 65:2 (2012) p.2.

77 John McCracken, *A History of Malawi, 1859–1966* (Woodbridge: James Currey, 2012) pp.343–59.

78 Banda & Kayira, 'The 1959 State of Emergency' p.3.

The commissioners, four members of the British establishment, spent five weeks in Nyasaland, and although Justice Devlin had been a Conservative supporter and other commissioners were Conservative Party members, it soon became clear to the colonial office that the Commission would produce a critical report.⁷⁹ The Commission took evidence from 455 individual witnesses and 1 300 witnesses in groups.⁸⁰ Very few Nyasaland Special Branch officers appeared before the Commission, as the Nyasaland government's legal officers were concerned that they might incriminate themselves, and argued that any officer summoned to appear should be accompanied by their superior.⁸¹

The findings of the Nyasaland Commission of Inquiry, also known as the Devlin Commission, embarrassed both the local governor and the authorities in Britain. The Commission dismissed evidence of any murder plot by the NAC, and criticised the Nyasaland government's handling of the state of emergency and its suppression of criticism, notoriously calling Nyasaland 'no doubt only temporarily, a police state'.⁸² Justice Devlin also said that most of the violence that occurred during this particular emergency, in which 5 245 Africans had been killed, was the result of government activity.⁸³ Finally, it noted the almost universal rejection of the Federation by Nyasaland's African population and suggested that the British government should negotiate with African leaders on the country's constitutional future.⁸⁴

Both the colonial secretary and governor of Nyasaland responded by claiming that Devlin's Report was misleading. Harold Macmillan, the British Prime Minister, dispatched another commission to Central Africa to investigate and make proposals for the future of the Federation of Rhodesia and Nyasaland. This Commission, under the chairmanship of Walter Monckton, reported that opposition to federation throughout Northern Rhodesia and Nyasaland was 'almost pathological ... widespread, sincere and of long standing', and advised that 'immediate political advances' be made there in order both to promote 'true partnership' and greater

79 Colin Baker 'The Mechanics of Rebuttal: The British and Nyasaland Governments' Response to the Devlin Report, 1959' *The Society of Malawi Journal* 60(2) (2007) pp.28-47.

80 *Ibid.*, pp.29-30.

81 Colin Baker *State of Emergency: Nyasaland 1959* (London: I.B. Tauris, 1997) pp.94, 106-7.

82 John Darwin *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (London: Macmillan, 1988) p.250; see also Murphy, 'A Police State' p.765.

83 McCracken, *History of Malawi*, pp.335-56, 359-60.

84 *Ibid.*

economic development.⁸⁵ The British government broadly accepted the Monckton Report, signalling a withdrawal of support for the Federation and the acceptance of early majority rule for Nyasaland and Northern Rhodesia.⁸⁶

The Devlin Report is the only example of a British judge examining whether the actions of a colonial administration in suppressing dissent were appropriate.⁸⁷ Not only was the Commission instrumental in the process of decolonisation, but by including findings such as that the colonial administration ‘does not seem to concern itself with the law as such’, in the final report Devlin signalled his belief in judicial independence and that the rule of law should continue even under conditions of colonial emergency.⁸⁸

2.3.3 1910-2015: South African Policing Commissions of Inquiry

At least 45 commissions of inquiry regarding the police have been constituted in South Africa in the period from 1910 to 2015.⁸⁹ South Africa under both colonialism and apartheid was highly bureaucratic and commissions of inquiry often were instituted either to justify actions taken against opponents of the colonial or apartheid regime or to provide the government with justification for acting against its opponents.⁹⁰ This was no less true regarding the conduct of police in the context of disturbances, protest actions and riots, which constitutes the subject of a large number of the commissions of inquiry in this period.⁹¹

The triggers for these ‘gatherings’ varied from hut and poll taxes, restrictions on the production and consumption of liquor or discriminatory labour practices, to the enforcement of pass laws, police brutality or, as in the case of Soweto in 1976, the imposition of Afrikaans as a medium of instruction in the so-called Bantu education system. In the police

85 Mazrui, *General History of Africa VIII* pp.242–43.

86 *Ibid.*

87 Charles Parkinson *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford: OUP, 2007) p.36.

88 Brian Simpson ‘The Devlin Commission (1959): Colonialism, Emergencies, and the Rule of Law’ *Oxford Journal of Legal Studies* 22(1) (2002), pp.19, 39.

89 Kok & Van der Spuy, ‘South African Inquiries into Policing’ p.1.

90 The documentation of some 81 commissions of inquiry in South Africa has been digitised and curated together in a special collection; see JSTOR: Struggles for Freedom, Southern Africa: Commissions of Inquiry, South Africa, available at: <https://www.aluka.org/struggles/collection/COMENQ>.

91 Kok & Van der Spuy, ‘South African Inquiries into Policing’ p.2.

encounters that followed, the action or reaction of the police was often steeped in the logic of paramilitary defence of 'state security'.⁹²

Although there was early internal resistance to this state logic, concerns about security force conduct under successive states of emergency only grew significantly in the 1980s.⁹³ The Commission of Inquiry into the Riots at Soweto and Other Places in the Republic of South Africa during June 1976, widely known as the Cillie Commission, was an example of a commission appointed to justify the actions taken by the police in the early stages of the uprising and to explore why the uprising occurred.⁹⁴ Not surprisingly, in its report, the Cillie Commission whitewashed the role of the police, pointing instead to the illegality of the march that ignited the revolt.⁹⁵ The apartheid government deployed these inquiries, which Sitze terms 'tumult commissions', with a view to enquiring into the 'causes' of a particular rebellion and to determine how it could improve 'race relations' to prevent further incidents.⁹⁶ Between 1980 and 1992, in the context of a widening of mass resistance and state repression, several commissions of inquiry were constituted to critique the logic of 'state security'.⁹⁷

In this way, the commission of inquiry in apartheid South Africa – recently described as 'a more prosaic name for the administrative organ tasked with listening to, evaluating, and archiving the voices of the victims of abuses of illegal state activity'⁹⁸ – was not a neutral institution, but rather a 'technique of governmentality that was deployed as a means to the end of securing and normalising colonial conquest'.⁹⁹ Indeed, Sitze argues, the Truth and Reconciliation Commission (TRC), far from being a novel experiment in transitional justice, seized upon the historical legacy of the commission of inquiry in South Africa.¹⁰⁰ It is important to note that commissions of inquiry, including those investigating matters of policing, have continued to be established in South Africa after the TRC, during

92 *Ibid.*

93 *Ibid.*

94 See 'JSTOR: Struggles for Freedom, Southern Africa: Commissions of Inquiry, South Africa'.

95 *Ibid.*

96 Sitze, *Impossible Machine*.

97 Kok & Van der Spuy, 'South African Inquiries into Policing' p.2.

98 J Barnard-Naude 'The TRC as biopolitical narrative (Part 2: The Tumult Commission)' *Thought Leader* (21 April 2016) available at: <http://thoughtleader.co.za/jacobarnardnaude/2016/04/21/the-trc-as-biopolitical-imperative-part-2-the-tumult-commission/>.

99 Sitze, *Impossible Machine*.

100 *Ibid.*

the democratic era. One of them, the Khayelitsha Commission, which is discussed in chapter 9, appears to stand in contrast to this tradition, in that it represented pressure from the ground upwards and resulted in a firm critique of central authority (in this case the national government-controlled South African Police Service (SAPS), critiqued from the provincial level). Another, the Farlam Commission, which investigated the death of 34 mine workers following police action at an industrial dispute in Marikana, Rustenburg, made a public example of the National Police Commissioner, but absolved several key political figures.

These case studies of colonial commissions in Africa demonstrate that, contrary to the dominant perception about commissions of inquiry captured by Kenyatta's fable, the actual impact of these commissions at least was a mixed record. In many instances it is true that colonial governments relied upon national commissions as an instrument to legitimate its power in African societies, and further to refine or enhance its colonial rule, but in a surprising number of instances, the independence of the commissions provided an opportunity to critique colonial rule, to suggest reforms to the existing colonial administration, and even to play a role in bringing colonial rule to its knees in the latter half of the twentieth century. It was this mixed legacy of colonial commissions that was inherited by newly-independent African states, and which will be examined in the next part.

3 Modern commissions investigating violations of the right to life in Africa

Many countries came to independence with a statute based on the English model allowing for the establishment of commissions of inquiry. Some countries, such as Nigeria, South Africa and Kenya, feature commissions of inquiry as a regular institution within their accountability architecture investigating a wide range of subjects, not only human rights abuses.¹⁰¹

When considering large-scale violations of the right to life, national commissions of inquiry have often been superseded by, or supplemented with, more bespoke transitional justice mechanisms, such as truth commissions, which, as Mark Freeman argues, should be understood in the long historical context of the practice of establishing commissions of inquiry, or national human rights institutions.¹⁰² Indeed, there was an

101 Richard Carver 'Called to Account: How African Governments Investigate Human Rights Violations' *African Affairs* 89 (July 1990) pp.391–415.

102 Mark Freeman *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006). Freeman defines a truth commission as an '*ad hoc*, autonomous, and victim-centred commission of inquiry set up in and authorised by a state for the primary purposes of (i) investigating and reporting on the principal

explosion of such commissions in Latin America in the 1980s and 1990s, starting a transitional justice trend – or, as some scholars have argued, an industry¹⁰³ – that has flourished in many parts of the world. Indeed, commissions were constituted in response to Argentina's so-called 'Dirty War', Pinochet's rule of Chile, and massive human rights violations in Brazil, El Salvador, Honduras, Guatemala, Paraguay and Uruguay. Truth commissions also were constituted with increasing frequency in Africa, starting with a commission set up in 1974 in Uganda; in 1990 to investigate Habré era abuses in Chad (see chapter 5); the South African Truth and Reconciliation Commission established in 1995; and others in Rwanda, Ghana, Liberia, Mauritius, Nigeria, Morocco, Sierra Leone, Uganda, Nigeria and Kenya.

There are few comparative studies on national commissions of inquiry. Priscilla Hayner analysed these early experiments with truth commissions across Latin America and Africa. In Latin America, the right to life violations were generally characterised by politically-motivated violence between those on the left and right, with military forces justifying the need to quell 'Communist subversives' on national security grounds. In Africa, Hayner suggested, the right to life violations have been characterised by violence between ethnic, religious or social groups where civilian political leaders have deliberately manipulated group identities for short-term political gain. Much of this tension was entrenched during colonial rule when traditional rulers were utilised to divide and rule native populations.¹⁰⁴

Thus, armed with a historical understanding about the mixed colonial legacy of commissions, as well as some of the best practices from recently-constituted commissions, our research team set forth to undertake a

causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of authoritarian rule or armed conflict; and (ii) making recommendations for their redress and future prevention'.

103 Tshepo Madlingozi 'On Transitional Justice: Entrepreneurs and the Production of Victims' *Journal of Human Rights Practice* 2(2) (2010) pp.208–28.

104 Priscilla Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd ed. (Routledge, 2010).

comprehensive study about national commissions of inquiry for violations of the right to life in Africa over the past 25 years.

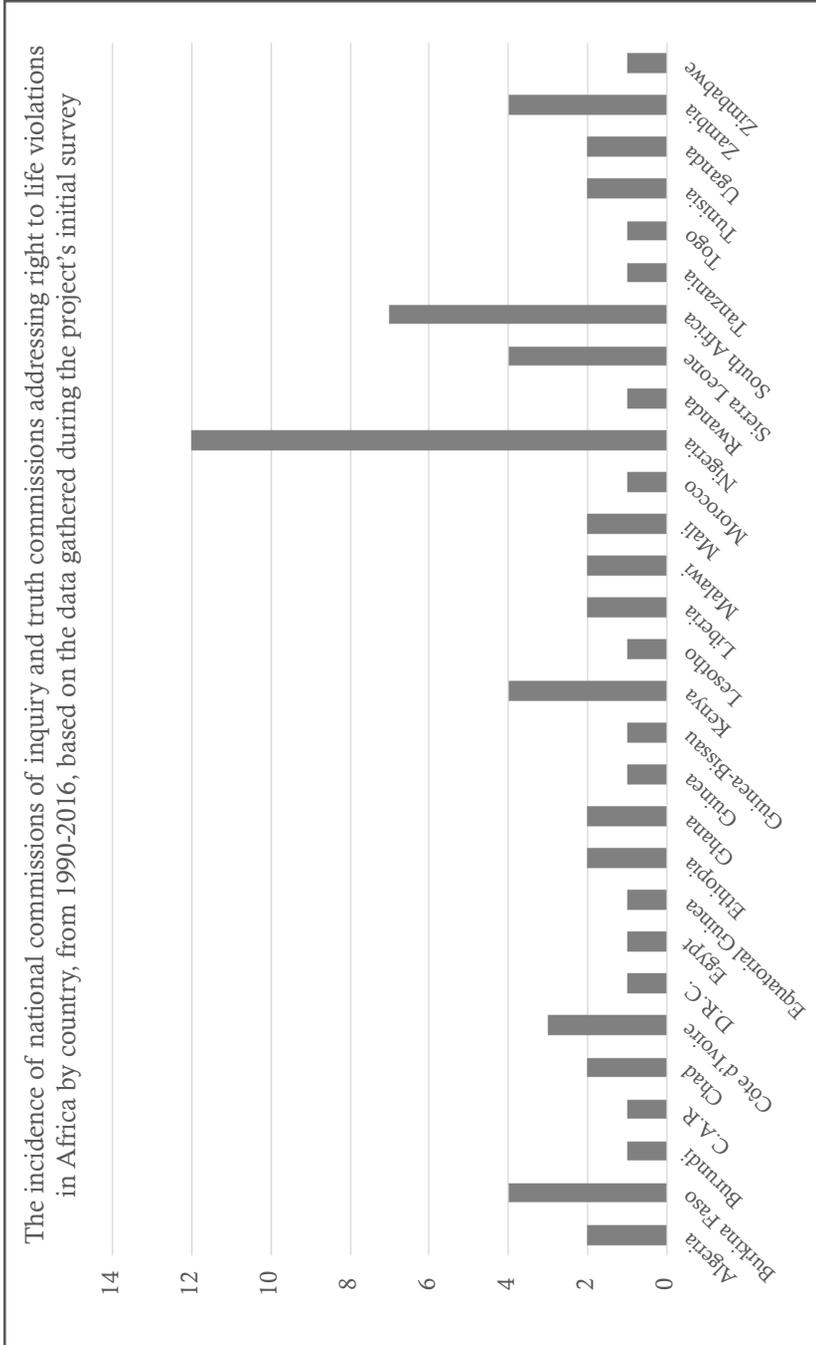
3.1 Study of commissions of inquiry for violations of the right to life in Africa

This book reflects research undertaken over the past several years at the University of Pretoria, stimulated by the impression that national commissions of inquiry are common in Africa, established to investigate a range of violations, including the right to life, yet in many places they appear to act as an impediment to rather than as an enabling mechanism of accountability. We thus set out to investigate whether and under what circumstances national commissions of inquiry in Africa could contribute to broader accountability processes for violations of the right to life and, more generally, whether there are there lessons that future commissions of inquiry can learn from the African experience.

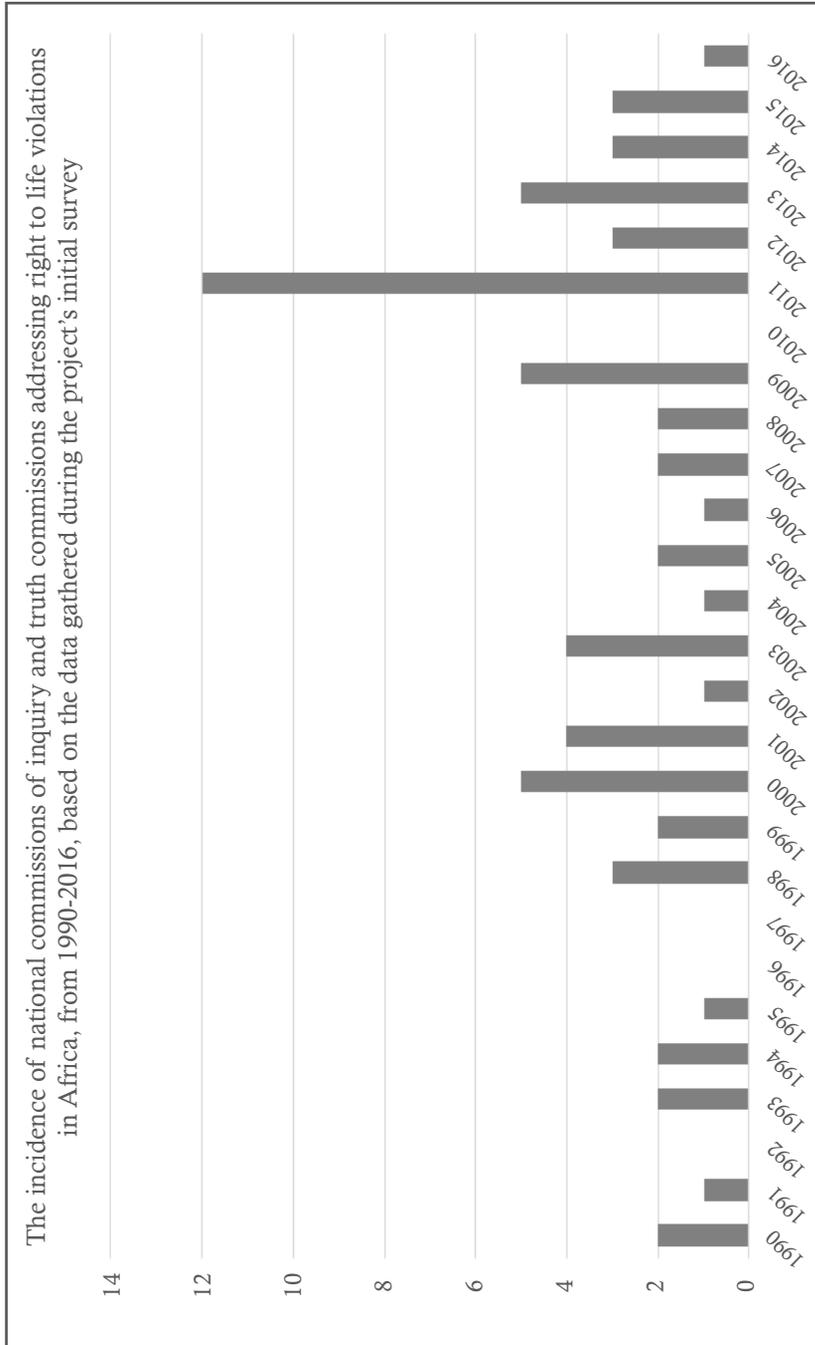
Our desktop research, summarised in Annex I, identified approximately 70 national commissions of inquiry established between 1990 and 2016 throughout Africa to investigate violations of the right to life.¹⁰⁵ Of the 70 commissions examined, approximately 45 are traditional commissions of inquiry and 25 are truth commissions. The significant contingent of African truth commissions in the last 25 years mirrors the global explosion of this recent innovation on the traditional commission of inquiry. Approximately 48 commissions were constituted in Anglophone countries, about 20 in Francophone countries and two in Lusophone or Hispanophone countries. This also reflects the dominance of commissions of inquiry within the common law tradition. Nigeria leads on the African continent with 12 national commissions constituted in the last 25 years on right to life issues alone, followed by South Africa and Zambia (see Graph 1). Over time, commissions of inquiry also appear to be becoming more common (see Graph 2), although this of course may reflect that more information is available about more recent commissions.

105 This research excludes most Lusophone countries, for reasons of researchers' linguistic capacity, although it does contain one commission from Guinea Bissau and one from Equatorial Guinea.

Graph 1



Graph 2



The data generated from our team's desktop research clearly reveals that national commissions are frequently established by African governments as accountability mechanisms. The remainder of this book will explore in greater depth the extent to which modern-day commissions continue to carry forth the mixed colonial legacy of serving as 'lawfare' to subdue local populations in times of crisis, or as an instrument of governmentality capable of catalysing reform. We will investigate whether the distinct feature displayed by post-colonial African commissions of maintaining local control over composition of staff, terms of reference, and operations alters the role the commission has been able to play within a broader process of accountability. We will also further investigate whether other external influences, in place of (or indeed, in addition to the legacy of) colonial empires, have influenced the impact of national commissions in African societies.